

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

January 10, 2003

IN RE:

**PETITION OF TENNESSEE UNE-P
COALITION TO OPEN A CONTESTED
CASE PROCEEDING TO DECLARE
SWITCHING AN UNRESTRICTED
UNBUNDLED NETWORK ELEMENT**

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**DOCKET NO.
02-00207**

ORDER REQUESTING COMMENTS

This docket came before the Pre-Hearing Officer to evaluate the response rate of competing local exchange carriers ("CLECs") to requests for data issued by the Tennessee Regulatory Authority ("Authority") on September 18, 2002 and October 25, 2002.

I. Relevant Procedural History

On May 24, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed the first set of discovery requests it had sent to Adelphia Business Solutions, Inc., XO Communications, Inc., Network Telephone, and Business Telecom, Inc., all of which were not parties to the docket. Each of the non-party recipients promptly objected. On June 11, 2002, BellSouth filed *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Data Requests From Third Parties: Network Telephone, Business Telecom, Inc., Adelphia Business Solutions, and XO Tennessee, Inc.* On June 21, 2002, XO Tennessee, Inc. and Business Telecom, Inc. filed a response to BellSouth's motion to compel.

On June 28, 2002, the Pre-Hearing Officer¹ issued the *Initial Order Resolving Discovery Disputes*. The Pre-Hearing Officer denied BellSouth's motion and directed the Authority to "promulgate data requests to issue to Network Telephone Corp., Business Telecom, Inc., XO Tennessee, Inc., ABS Nashville, and any other CLEC which the Authority determines should respond."² Further, the Pre-Hearing Officer attempted to set out a procedure to ensure the protection of the non-parties' confidential information.³

On July 12, 2002, BellSouth filed *BellSouth Telecommunications Inc.'s Motion to Hold Proceeding in Abeyance*, and on August 14, 2002, the UNE-P Coalition filed a *Petition for Clarification or Reconsideration*. Director Ron Jones, acting as the Pre-Hearing Officer⁴ entered an *Order Denying Motion to Hold Proceeding in Abeyance and Granting Motion for Reconsideration or Clarification* on September 13, 2002. In the order, the Pre-Hearing Officer held that the data requests described in the *Initial Order Resolving Discovery Disputes* should issue by September 18, 2002 and that all entities receiving such requests should respond by September 25, 2002. Further, the Pre-Hearing Officer noted that those entities receiving data requests that are not parties to the docket should respond in accordance with the *Initial Order Resolving Discovery Disputes*.⁵

On September 18, 2002, the Authority sent data requests to Adelphia Business Solutions, Inc., XO Tennessee, Inc., Network Telephone, and Business Telecom, Inc. On September 24,

¹ At this time former Director Melvin J. Malone was acting as the Pre-Hearing Officer. Director Malone's term as a director of the Tennessee Regulatory Authority expired on June 30, 2002.

² *Initial Order Resolving Discovery Disputes*, pp. 15-16 (Jun. 28, 2002).

³ *Id.*

⁴ During the July 23, 2002 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Sara Kyle and Directors Deborah Taylor Tate and Ron Jones unanimously voted to appoint Director Ron Jones as the Pre-Hearing Officer.

⁵ *Order Denying Motion to Hold Proceeding in Abeyance and Granting Motion for Reconsideration or Clarification*, pp. 14-15 (Sept. 13, 2002); *Erratum of September 13, 2002 Order* (Sept. 17, 2002).

2002, XO Tennessee, Inc. filed a *Petition to Reconsider and Request for Additional Time to Respond to Data Requests*. In its filing, XO Tennessee, Inc. requested an extension and sought reconsideration of the decision requiring the non-parties to respond in accordance with the procedure set forth in the *Initial Order Resolving Discovery Disputes*. On September 25, 2002, XO Tennessee, Inc. filed a letter in further support of its petition and also raised an issue as to whether the Authority should have sent requests to all CLECs. On that same day, Business Telecom, Inc. filed a request for extension.

On September 25, 2002, the Pre-Hearing Officer entered an *Order Granting Extension, Setting a Response Date, and Relieving Parties of a Filing Requirement*. The Pre-Hearing Officer granted all non-party CLECs an extension, but did not set a date for the filing of responses. Instead, the Pre-Hearing Officer held that a due date would be determined at the October 2, 2002 status conference. Further, the Pre-Hearing Officer instructed that responses to XO Tennessee Inc.'s petition were to be filed by October 1, 2002.⁶ BellSouth filed a timely response.

During the October 2, 2002 status conference, the participants raised concerns over the extent to which the non-party CLECs' identities should be protected and whether the data requests should be sent to all non-party CLECs. As a result of the discussions and questioning, BellSouth, the UNE-P Coalition, and Time Warner agreed to enter into negotiations to determine whether they could stipulate to certain facts. These parties further agreed that entering into such stipulations could render the receipt of non-party CLEC responses unnecessary. With the agreement of the parties, the Pre-Hearing Officer instructed BellSouth to submit draft stipulations to the UNE-P Coalition and Time Warner by October 4, 2002. Additionally, the

⁶ *Order Granting Extension, Setting a Response Date, and Relieving Parties of a Filing Requirement*, p. 2 (Sept. 25, 2002).

UNE-P Coalition agreed to notify the Authority by Tuesday, October 8, 2002 of how long it anticipated the parties would need to reach agreement on the stipulations.

On October 9, 2002, the UNE-P Coalition filed a letter stating that it had reviewed the stipulations proposed by BellSouth and concluded that "it appears that the parties will not be able to reach agreement on the stipulations."⁷ On October 10, 2002, BellSouth filed a response to the UNE-P Coalition's letter. The UNE-P Coalition replied to BellSouth's letter on October 15, 2002 reaffirming its previous assertions.⁸ BellSouth filed another letter regarding this dispute on October 17, 2002.

On October 23, 2002, the Pre-Hearing Officer issued the *Order on October 2, 2002 Status Conference and Subsequent Filings*. In the order, the Pre-Hearing Officer determined that it was unlikely the parties would enter into stipulations and the docket should move forward. The Pre-Hearing Officer found that the information requested by the Authority is pertinent to the application of the federal impair standard and that the Authority should obtain such information from all facilities-based CLECs authorized to provide service in BellSouth's service area. As to the manner in which the responses should be filed, the Pre-Hearing Officer determined that the non-party-CLECs should file their responses in sealed envelopes containing a notation that the contents are protected pursuant to the order. Next, a member of the Authority's staff would be designated to aggregate the data, prepare a matrix setting forth the aggregated data, and file the matrix in the docket. The Pre-Hearing Officer set the date for issuance of data requests for October 25, 2002, ordered all request recipients to file their responses with the Authority on or before November 8, 2002, and directed that the designated Authority staff member would file the

⁷ Letter from the UNE-P Coalition to Director Ron Jones dated Oct. 8, 2002, p. 1 (Oct. 9, 2002).

⁸ Letter from the UNE-P Coalition to Director Ron Jones dated Oct. 15, 2002, p. 1 (Oct. 15, 2002).

aggregated data by November 15, 2002. Additionally, the Pre-Hearing Officer ordered the parties to file certain agreed dates by November 20, 2002.⁹

As directed, the Authority sent data requests to all facilities-based CLECs authorized to provide service in BellSouth's service area on October 25 2002, bringing the total number of data requests sent to eighty-nine (89). As of November 14, 2002, less than fifty percent (50%) of all CLECs sent data requests had filed responses. Given the lack of timely responses, the Pre-Hearing Officer issued an order on November 14, 2002 suspending the November 15 and November 20 deadlines and directing those CLECs that had not yet responded to do so by November 27, 2002.¹⁰

II. Findings and Conclusions

To date, thirty-two (32) CLECs have failed to respond to the data requests and four (4) of the data requests have been returned to the Authority as undeliverable. Attached is a list of those CLECs that have not responded. Of those CLECs, wireline activity reports filed with the Authority indicate that eight (8) of the CLECs are actively providing service in Tennessee.

Consistent with previous decisions, the Pre-Hearing Officer finds that the information requested is pertinent to the analysis in this docket and that the Authority's capacity to conduct a comprehensive assessment will be heightened by obtaining the requested information from all facilities-based CLECs authorized to provide service in BellSouth's service area. Nevertheless, despite having received an extended time period within which to respond, certain non-party CLECs have failed to respond to the requests or comply with related orders.¹¹ Given these circumstances, the Pre-Hearing Officer finds that it would aid the Pre-Hearing Officer in

⁹ *Order on October 2, 2002 Status Conference and Subsequent Filings*, pp. 8-12 (Oct. 23, 2002).

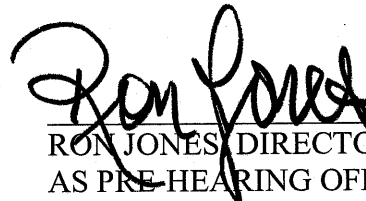
¹⁰ *Order Suspending Dates*, p. 2 (Nov. 14, 2002).

¹¹ *Order Suspending Dates*, p. 2 (Nov. 14, 2002); *Order on October 2, 2002 Status Conference and Subsequent Filings*, pp. 8-12 (Oct. 23, 2002).

determining how to proceed if the parties were to comment on the current state of this docket. Such comments should include a discussion of whether responses from the remaining CLECs are necessary to the determination of the issues in this docket and how this docket should proceed absent receipt of the remaining responses to the Authority's data requests. Any party asserting that the docket should not proceed further until such information is received should provide detailed, specific arguments demonstrating how the lack of information will prejudice that party.

IT IS THEREFORE ORDERED THAT:

The parties shall file comments in accordance with this order by **Wednesday, January 22, 2002.**



RON JONES, DIRECTOR
AS PRE-HEARING OFFICER

ATTACHMENT TO JANUARY 10, 2003 ORDER REQUESTING COMMENTS

*[†] Access Integrated Networks, Inc.
Access Point, Inc.
Accutel of Texas, Inc.
[‡] American Communication Services of Chattanooga
*[†] AT&T Communications of the South Central States
*[†] Birch Telecom, Inc.
Broadplex, LLC
[‡] CCCTN, Inc., d/b/a Connect!
Ciera Network Systems, Inc.
KMC DATA, LLC
KMC Telecom V, Inc.
LoadPoint Telecommunications, LLC
Maxcess, Inc.
McLeod USA Telecommunications Services, Inc.
Memphis Networx, LLC
[†] Momentum Business Solutions, Inc.
MountaiNet Telephone Company
[‡] NationNet Communications
New Edge Network, Inc.
NOW Communications, Inc.
[†] Nu Vox Communications, Inc.
Progress Telecom Corporation
[†] Qwest Communications Corporation
* TCG MidSouth, Inc.
Telepak Networks, Inc.
Touch America, Inc.
VarTec Telecom, Inc.
VIVO-TN, LLC
Williams Communications, LLC
[†] Xspedius, LLC
[‡] Zephion Networks, Inc.
*[†] Z-Tel Communications, Inc.

* Companies that responded to BellSouth's discovery request, but failed to respond to the Authority's data requests. The Authority's data request although similar to BellSouth's discovery request, requested additional information.

[†] CLECs that are active in Tennessee according to the wireline activity reports filed with the Authority.

[‡] The October 25th data requests sent to these carriers were returned undeliverable. NationNet Communications has not paid its inspection fees, but has received an extension until January 31, 2003 to do so. CCCTN, Inc. d/b/a/ Connect! and Zephion Networks, Inc. have not paid their inspection fees despite the fact that the Authority has sent notices of cancellation to each carrier.